

THE NATURAL LAWYER

TRANSPORTATION RESEARCH BOARD COMMITTEE ON ENVIRONMENTAL ISSUES IN TRANSPORTATION LAW (A4006)

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FINAL INJUNCTION ENTERED IN GOSHEN, INDIANA HIGHWAY CASE

Submitted by Glenn Harris
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The last edition of this newsletter reported the 7th Circuit's decision involving 3rd Street in Goshen, IN. The 7th Circuit suggested that the City of Goshen be enjoined from seeking federal money for the 3rd Street project. The City asked for this relief on remand to the District Court, but the Plaintiffs objected. On August 12, 2003 the District Court ruled that the City could not pursue any Federal money for any construction work on 3rd Street for 30 years and for any maintenance for four years. The City cannot put up signs that redirect traffic to 3rd Street and cannot ask that this street be part of the National Highway System. As to the Federal defendants, the Court ruled that by deobligating funds, they had not taken action for funding or approval that would subject the 3rd Street project to the requirements of Federal law. *Old Town Neighborhood Ass'n, Inc. v. Kauffman*, S.D.Ind. # 1:02-cv-1505-DFH

COURT ORDERS ONE ASSESSMENT OF IMPACTS ON RELATED HIGHWAY PROJECTS IN NORTH CAROLINA

Case submitted by Lisa Glover
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When FHWA approved a FONSI for the expansion of 13.6 miles of I-26 from 4 to 6 lanes near Asheville, NC, a number of groups sued. They claimed that a number of related projects should have been included in the assessment. On review the District Court found that the other projects, although not as far along in the planning process, were inevitable and were part of a related plan. As such, they were reasonably foreseeable and their cumulative impacts had to be assessed. Earlier draft documents and internal communications had conceded as much. The Court went on to find that the project at

issue in the FONSI was improperly segmented. The project's northern terminus would create a bottleneck which would have to be alleviated by another project. The project would also foreclose the no build alternative for another job. The EA was also faulted because it presented safety data which was shown to be inaccurate and never corrected. *Western North Carolina Alliance, et al. v. North Carolina DOT, et al.*, E.D. N.C. #5:02-CV-343-BO(3), July 1, 2003.

OLD EIS FOR NORTH CAROLINA BYPASS APPROVED

With only six days to go before the Statute of Limitations was going to run, a group of property owners sued to stop North Carolina DOT from awarding a contract to improve 12.4 miles of US 1. They contended that the project was part of a much larger project to expand US 1 and that therefore a programmatic EIS should have been prepared and that additional analysis of cumulative impacts was necessary. The Court denied the request for preliminary injunction because the other improvements were not far enough along to require their assessment, and a programmatic EIS was not needed once a site specific EIS was prepared. The Court also endorsed the cost benefit analysis and traffic data. *Mooreforce, Inc., et al. v. USDOT, et al.*, 243 F. Supp. 2d 425 (M.D.N.C. 2003)

4TH CIRCUIT ENDORSES FAA EIS FOR EXPANSION OF NORTH CAROLINA CARGO AIRPORT

FAA approved the expansion of Piedmont Triad International Airport (PTIA) which serves the area around Greensboro, High Point and Winston-Salem, North Carolina. The plan called for construction of a new parallel 9000 foot runway with a 300 acre cargo sorting facility between the two runways. The case belonged in the Court of Appeals because part of the FAA's approval involved air commerce or the national defense. The purpose and need statement (construction of a cargo hub at PTIA with parallel, widely spaced 9000 foot runways) was endorsed because it came from the project sponsor and was consistent with the Congressional mandate given to FAA. The noise analysis was upheld because it focussed air travel over the areas where it most likely, although not necessarily, would go. The lack of analysis of human health impacts from toxic aircraft emissions was upheld because EPA signed off and because there was support for FAA's conclusion that there was no known cause and effect relationship. The project's 2% effect on area population growth over 20 years was insignificant because the area is forecasted to grow by 25% over the same period. *Alliance for Legal Action, et al. v. FAA, et al.*, 4th Circuit No. 02-1062, July 10, 2003

FAA EA/FONSI REJECTED FOR AIRPORT EXPANSION NEAR YOSEMITE NATIONAL PARK

When FAA approved the expansion of an airport to accept commercial jet service for the first time, the State of California and others filed suit. The expansion was intended to increase the number of visitors to the region, but the EA did not say much about secondary and cumulative impacts. The adverse comments from the resource agencies were viewed by the Court as establishing adequate controversy to justify an EIS. The Court characterized FAA's view of the airport project as "myopic." The surrounding area is forecast to grow significantly with or without the airport, but the Court felt that there needed to be analysis of the growth that would be accelerated by the project. The EA said that the project would reduce the need for people to drive to the area so it would reduce emissions. The Court called this assessment "at most disingenuous or at least

wishful thinking.” *People of the State of California, et al. v. USDOT, et al.*, 260 F. Supp. 2d 969, 2003 U.S. Dist. LEXIS 8998 (N.D.Cal. 2003)

NEW HAMPSHIRE HIGHWAY INTERCHANGE PROJECT CAN TAKE WETLANDS

New Hampshire DOT planned to replace a busy “T” intersection with a trumpet interchange. The project required the use of 5.45 acres of wetlands. The New Hampshire Dept. of Environmental Services and the New Hampshire Wetlands Council approved the project and the trial court reversed. On appeal the Supreme Court of New Hampshire reversed and affirmed the Wetlands Council. The Court construed the wetlands rules and held that they did not require an analysis of vernal or seasonal pools unless there was evidence that species listed in the rules would be adversely affected. The Court upheld the analysis which showed there was too much projected traffic to use a roundabout design. *Conservation Law Foundation v. New Hampshire Wetlands Council*, No. 2002-282, September 12, 2003, <http://www.courts.state.nh.us/supreme/opinions/2003/conse116.htm>

WETLANDS THAT DRAIN THROUGH INTERSTATE HIGHWAY DITCH ARE WATERS OF THE UNITED STATES

A developer was cited for filling wetlands on his property without the approval of the Army Corps of Engineers or the State of Virginia. The wetlands had historically been connected to a stream, but the connection was interrupted by the construction of I-64. Now the waters from the wetlands flow through a series of ditches before entering the stream. The Court found that this was adequate connection for purposes of Federal jurisdiction under Section 404 of the Clean Water Act. In addition the Court found that even though the State of Virginia had modeled its wetland program after the Federal scheme, the State program was governed by State law. As a result, the Court remanded the State’s enforcement action to State court. *Treacy, et. al. v. Newdunn Associates, LLP, et al.*, Fourth Circuit Nos. 02-1480, 02-1594, September 10, 2003

MINNESOTA STORMWATER PERMIT FOR SMALL MUNICIPALITIES STRUCK DOWN

When the Minnesota Pollution Control Agency issued a general permit for small municipalities (MS4’s) to authorize their stormwater discharges, an environmental group sued. The Court ruled that a general permit was not appropriate because the individual municipalities were not really the same or substantially similar. The Court was also concerned that there would be no public involvement in the preparation of each permittee’s stormwater pollution prevention program and that increased discharges may violate the antidegradation policy. The use of best management practices instead of numerical effluent limitations and the lack of monitoring requirements were upheld by the Court. *Minnesota Center for Environmental Advocacy v. Minnesota Pollution Control Agency*, 660 N.W. 2d 427, May 6, 2003

NCHRP PUBLISHES LEGAL RESEARCH DIGEST ON CIVIL RIGHTS IN TRANSPORTATION PROJECTS

The National Cooperative Highway Research Program has published a digest that addresses the litigation associated with environmental justice and relates it to transportation plans and projects. The author is the Solicitor General for the State of

Maryland. The Digest summarizes the Title VI cases that have addressed standing, burden of proof, and the lack of a private right of action to enforce the disparate impact regulations which have been adopted by the Federal funding and permitting agencies. The author concludes that the disparate impact standard in these regulations may not be authorized by Title VI and that there is little chance the regulations can be enforced through the use of 42 USC 1983. Baida, "Civil Rights in Transportation Projects," NCHRP Legal Research Digest June 2003-Number 48. Available through TRB.

U.S. COMMISSION ON CIVIL RIGHTS ISSUES COMPREHENSIVE REPORT ON ENVIRONMENTAL JUSTICE

On September 4, 2003 the U.S. Commission on Civil Rights released a draft report prepared in its Office of the General Counsel. The 200 page report summarizes the environmental justice movement and the progress to date on implementing Executive Order 12,898. The report finds that federal agencies have failed to incorporate environmental justice in their core missions, failed to adopt accountability and performance outcomes for programs and activities, and are lacking in commitment to environmental justice issues at the agency leader level. The report reviews the performance of USEPA, the Dept. of Interior, HUD, and USDOT and recommends extensive legislative and administrative solutions. "Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice." <http://www.usccr.gov>

CHAIR'S CORNER

Submitted by Helen Mountford
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Anyone who missed the TRB Legal Workshop in New Orleans in July, missed out on a very good program in a very fun place. The Committee met, heard a provocative update on wetland issues, and started planning our future sessions. Our members are now busy arranging programming for the TRB Annual Meeting in Washington, D.C. January 11-15, 2004. We will meet sometime during that week, but I don't yet know when. I hope as many members and friends as possible will be able to attend.

It appears our work representing our transportation clients will never end. The continuing clashes between administrative policies, environmental community goals, our clients' needs and the public's wishes ensure that the lawyers' work is ongoing, innovative and interesting. This Committee is one of the best places to exchange ideas and experiences and *The Natural Lawyer* is one of the best places to keep up with what is actually happening out there. *The Natural Lawyer* owes its success to Mr. Rich Christopher, the editor, whose tireless efforts keep it on a regular publication track, and he deserves our continual thanks. It is only effective, however, when our members and friends submit information. So, please submit your stories and make plans to be in D.C. in January.

NEXT COPY DEADLINE IS DECEMBER 15, 2003

Please get your submissions for the January, 2004 *Natural Lawyer* into the Editor by the close of business on December 15, 2003. Please use the e-mail address or FAX number listed at the beginning of the newsletter or mail to Rich Christopher, IDOT, 310 South Michigan, Chicago, IL 60604.